Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JOSEPH A. MAY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an individual is prohibited under 28 U.S.C. Section 2255 from raising his Fifth Amendment right not to be punished twice for the same offense by failing to advance this issue on direct appeal.

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No. 96-

IN THE
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JOSEPH A. MAY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

Petitioner Joseph A. May petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eighth Circuit in Case No. 96-1105 entered on August 1, 1996.

OPINION BELOW

The District Court's Order is reprinted in Appendix A to this Petition. The opinion of the Eighth Circuit is reprinted in Appendix B. The denial of the Petition for Rehearing is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The opinion of the court of appeals in this matter was filed on August 1, 1996. Petitioner timely filed a Petition for Rehearing that was denied on October 3, 1996. (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

This case is concerned with the Fifth Amendment of the United States Constitution:

> ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb... .
>
> U.S. Constitution Amendment V

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 3, 1992, an Indictment was filed with the United States District Court for the Western District of Missouri, Western Division, against May. The Indictment charged in Counts One through Five, as follows:

> During the calendar year[s] [1985, 1986, 1987, 1988 and 1989], JOSEPH A. MAY, defendant herein, who was then a resident of Cass county, in the State of Missouri, had and received gross income in excess of [the statutory amount]; by reason of such gross income he was required by law, following the close of the calendar year[s] [1985, 1986, 1987, 1988 and 1989], and on or before April 15, [1986, 1987, 1988, 1989 and 1990], to make an income tax return to the Director, Internal Revenue Service Center, at Kansas City, Missouri, in the Western District of Missouri, or to the

Representative of the District Director of the Internal Revenue Service for the District of Missouri, post of duty office at Kansas City, Missouri, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; and well-knowing and believing all of the foregoing, he did willfully fail to make an income tax return to said Director of the Internal Revenue Service Center, to said Representative of the District Director of the Internal Revenue Service, or to any other officer of the United States.

All in violation of Title 26, United States Code, Section 7203.

The Indictment charged in Counts Six and Seven, the following:

During the calendar year[s] [1988 and 1989], JOSEPH A. MAY, defendant herein, then a resident of Cass County, in the State of Missouri, had and received taxable income in the sum of approximately [$45,138 and $24,721]; upon said taxable income there was owing to the United States of America an income tax of approximately [$16,272 and $8,394] (said figure includes self employment tax); and well-knowing the foregoing facts, defendant JOSEPH A MAY, on or about [April 17, 1989 and April 16, 1990], in the Western District of Missouri, did willfully attempt to evade and defeat the said income tax due and owing by him to the United States of America for said calendar year by failing to make an income tax return on or before [April 17, 1989 and April 16, 1990], as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, and by utilizing bank accounts established in nominee names for deposit of income and withdrawal, by purchasing assets in nominee names, by converting substantial amounts of income to

currency, by paying business expenses in currency, or by money orders, cashier checks, third party checks, or checks drawn on bank accounts established in nominee names, and by other acts of concealing and attempting to conceal from all proper officers of the United States of America his true and correct income.

All in violation of Title 26, United States Code, Section 7201.

On June 11, 1993, the Magistrate Judge ordered Dr. May's commitment and incarceration at the United States Medical Center (USMC) for Federal Prisoners located at Springfield, Missouri, pursuant to 18 U.S.C. 4247(b), to undergo a psychological examination, pursuant to 18 U.S.C. 4241(b). All of this was orchestrated by the lower court, the United States Attorney, and purported standby counsel from the Federal Public Defender's office, Ronald Hall. Although Hall was assigned to Dr. May's case over his objections as standby counsel, Dr. May was excluded from any hearings and the other *ex parte* proceedings leading to his incarceration. Dr. May's incarceration at the USMC was purportedly authorized by Magistrate Judge Robert E. Larsen's recommendation without sanction or approval by the District Court. Dr. May was taken into custody in open court and transported to the USMC.

On June 11, 1993, the Internal Revenue Service also issued a jeopardy assessment against Dr. May. On June 14, 1993, Internal Revenue Service agents appeared at the USMC. The agents met with Dr. May and informed him for the first time that a jeopardy assessment had been made. The agents provided Dr. May with Notice Of Jeopardy Assessment And Right Of Appeal and a Notice of Tax Due on Federal Tax Return for the tax years 1985, 1986, 1987, 1988 and 1989.

The Jeopardy Assessment Narrative issued on June 11,

1993, noted that May had been indicted by a federal grand jury:

> Dr. Joseph Allen May was indicted by a federal grand jury on November 3, 1991. Counts 1 through 5 of the Indictment charged Dr. May with willful failure to file income tax returns for the taxable years ending 12-31-85 through 12-31-89, inclusive, in violation of 26 U.S.C. Section 7203. Counts 6 and 7 of the Indictment charged Dr. May with income tax evasion for the taxable years ending 12-31-88 and 12-31-89, in violation of 26 U.S.C. Section 7201.

The Jeopardy Assessment Narrative repeated numerous averments contained in the Indictment for the years at issue herein:

> Dr. May told a government witness that he had not filed any type of income tax return in over ten years, had not paid any type of income tax in over ten years, does not intend to pay any income tax, and that he converted his patient checks to cash as a way to hide his earnings from the Internal Revenue Service.
>
> Dr. May told another government witness during 1988 and 1989: He converted a substantial portion of his patient checks to cash and hides cash in and around the farm deeded in Glenda Scoville's name so the money cannot be traced to him by the Internal Revenue Service. Dr. May also told the witness that he did this because he never intended to pay any tax on his earnings, never intended to spend any time in jail for his actions and would disappear if the Internal Revenue Service got too close to him.
>
> During the years under investigation (1985 through 1989), Dr. May maintained ... bank accounts in nominee names...

During the years under investigation (1985 through 1989), Dr. May also purchased assets and/or accumulated assets in nominee names...

Dr. May has been placing his assets beyond the reach of the Government, by concealing them, transferring them to nominees, or by dissipating them.

The Jeopardy Assessment imposed fraud penalties against May for the years 1985 through 1989, as follows: 1985, 26 U.S.C. Section 6653(b)(1) in the amount of $5,475.00 and Section 6653(b)(2) in the amount of $5,574.00; 1986, 26 U.S.C. Section 6653(b)(1)(A) in the amount of $3,499.00 and Section 6653(b)(1)(B) in the amount of $1,961.00; 1987, 26 U.S.C. Section 6653(b)(1)(A) in the amount of $3,707.00 and Section 6653(b)(1)(B) in the amount of $1,652.00; 1988, 26 U.S.C. Section 6653(b)(1) in the amount of $18,411.00; and 1989, 26 U.S.C. Section 6651(f) in the amount of $15,899.

On June 14, 1993, the Internal Revenue Service served a Notice of Levy on State Farm Insurance, Jan Wagoner, Adjuster. Ms. Wagoner executed a draft and forwarded same to the Internal Revenue Service shortly thereafter. Glenda Scoville May's insurance proceeds were seized under the Government's determination that she was a mere nominee of Dr. Joseph May, not the owner of the subject property. This initial draft was in the amount of $92,086, which represented the building limit under Claimant's Farm Ranch Policy.

State Farm Insurance subsequently issued a second draft to the Internal Revenue Service. The Internal Revenue Service confiscated in excess of $152,000.00.

On August 9, 1993, the Internal Revenue Service issued a statutory notice of deficiency for the tax years 1987 through 1989.

The Service explained that the fraud penalty was imposed because:

> It has been determined that you failed to timely file your Federal income tax return with the *intent to evade or defeat the tax* due. Consequently, there is added to the tax 75 percent of the underpayment of tax for each month the return was not filed, in accordance with Section 6651(f) of the Internal Revenue Code.

On July 17, 1993, May was transported from the USMC to a county jail and then incarcerated at Leavenworth, Kansas, due to the lower court's decision that he was a flight risk. Dr. May was incarcerated at Leavenworth until his release on January 16, 1994, an additional 191-days. Dr. May was incarcerated a total of 230 days, 191-days of which was with hard-core prisoners, pretrial, in Leavenworth, and subjected to conditions generally reserved for prisoners who committed capital offenses. This was after Dr. May was committed to the Springfield psychiatric facility, and after he was imprisoned in county jail, while the Government provided him with transportation therapy from Springfield to Leavenworth. Dr. May had two choices: (1) remain incarcerated pretrial, or (2) enter into a plea agreement, which would result in his immediate release from incarceration.

On January 26, 1994, May signed the plea agreement, and May appeared later that same date to plead guilty before the Court. The plea agreement included the fraud penalties for the tax periods 1985 through 1989.

> The parties further agree that these obligations should be ordered to be paid as follows: that restitution be satisfied in the first instance from the money seized as a result of the IRS jeopardy assessment. Any money in excess of restitution shall be disposed of by order of the Court. Any deficiency shall be satisfied by the fixing of a payment

schedule by the U.S. Probation Office for purpose of payments based upon defendant's earnings.

The Court took the plea of guilty under advisement and accepted same a hour later. The Court subsequently sentenced May the same date. On February 1, 1994, the Court's judgment was entered finding May guilty on Counts One through Five of the Indictment. May was sentenced (1) to be imprisoned for a term of 191 days on Counts One through Five, the terms to run concurrently; (2) to be on supervised release for a term of 1 year; (3) to be on home detention for 4 months which may include electronic monitoring, with the costs to be paid by May, (4) to perform 150 hours of community service during the first 11 months of supervision, and other sanctions.

On January 23, 1995, the Court extended May's supervised release until January 25, 1999, under the same terms and conditions originally imposed on January 26, 1994.

It must be noted that the jeopardy assessment was in the combined amount of approximately $179,000.00, consisting of $66,302.00 for the actual tax liability with the remaining amounts consisting of penalties and interest. The fraud penalties were: 1985, $5,475.00 and $5,574.00; 1986, $3,499.00 and $1,961.00; 1987, $3,707.00 and $1,652.00; 1988, $18,411.00; and 1989, $15,899, plus interest thereon for an approximate amount of $112,000.00. In reviewing the PreSentencing Investigative Report by the United States Probation, the Court recognized that May had paid all the taxes, interest and fraud penalty due and owing with an excess of $20,000 to administrate at the Court's pleasure by the jeopardy assessment and seizure.

On June 23, 1995, Dr. May filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to the provisions of 28 U.S.C. Section 2255. May argued that his conviction by his plea of guilty

to five counts of failing to file an income tax return violated his rights under the Double Jeopardy Clause, since he had already been punished in a separate proceeding for the same offense.

On August 9, 1995, the District Court issued an Order Directing Respondent to Show Cause. Said order directed the United States Attorney to answer May's allegations and to show cause within thirty (30) days from the date of said order why the relief May sought should not be granted.

On August 25, 1995, United States filed its response to the District Court's order to show cause. United States argued, among others, that May waived his double jeopardy claim by the plea agreement. On August 29, 1995, the District Court instructed Dr. May that he had twenty (20) days to file his reply brief. May filed his reply brief on September 13, 1995.

On December 27, 1995, the District Court's Order denying May's motion to vacate, set aside or correct sentence was entered. The Court found that:

> A defendant may waive a constitutional right if the waiver is voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742 (1970). "The protection of the Double Jeopardy clause is a personal defense that may be waived or foreclosed by a defendant's voluntary actions or choices ...." *United States v. DiPietro*, 936 F.2d 6, 9 (1st Cir. 1991).
>
> May pleaded guilty after the issuance of the IRS' jeopardy assessment. May agreed in the Plea Agreement to pay all of his obligations (tax, penalty, and interest) for tax years 1985 through 1989, which could be satisfied from the proceeds seized as a result of the IRS jeopardy assessment. May also agreed that the criminal restitution did not reflect

> his civil tax liabilities, and that nothing in the plea agreement limited the IRS in the assessment and collection of such. Consequently, May waived any argument about double jeopardy sentencing from an assessment for unpaid taxes, penalties, and interest by entering into the plea agreement with the United States.
>
> Accordingly, it is ORDERED that defendant's Motion to Vacate, Set Aside, or Correct his Conviction and Sentence Under 28 U.S.C. [Section] 2255 is denied.

May appealed from that Order of the District Court, and he challenged the imposition of a second punishment for the same offense/transaction for which he had already been punished in a separate proceeding pursuant to the Double Jeopardy Clause. The District Court was without jurisdiction of the subject matter to impose the second punishment, notwithstanding the fact that May entered into a plea agreement.

The primary issue advanced by May in his opening brief was that the imposition of a civil fraud penalty, which became final prior to the criminal proceeding becoming final, barred the criminal punishment under the Double Jeopardy Clause. This issue was conceded by United States in its answering brief. At pages 3 and 4 of the Government's brief, it expressly acknowledged that the plea agreement was a final determination of the civil fraud penalties:

> Finally, the record does not reflect that civil penalties were in fact finally imposed on movant in a proceeding prior to the imposition of his sentence in the criminal case. ... The jeopardy assessment against movant and the levies under it were not a "proceeding" or a final adjudication of movant's tax liability. It was only in the criminal sentencing that movant was ***finally*** ordered to

> pay the penalties. Accordingly, even if the fraud penalties in this case were considered punishment, the imposition of those penalties would not have violated the Double Jeopardy Clause.

United States admitted that the criminal proceeding finalized the fraud penalties when "movant was finally ordered to pay the penalties." See e.g., U.S. v. Hudson, 14 F.3d 536, 538 (10th Cir. 1994); United States v. Stanwood, 872 F.Supp. 791 (D.C.Or. 1994) (jeopardy attaches when the final judgment of forfeiture is entered); Oakes v. U.S., 872 F.Supp. 817 (E.D.Wash. 1994) (first punishment occurred when plea agreement signed, since Oakes forfeited his interest pursuant to said agreement). Based upon the record and admissions before the panel, the whole world was constructively informed that May was being subjected to a second punishment, which the Double Jeopardy Clause absolutely prohibits. See also United States v. Williams, 534 F.2d 119, 120 (8th Cir.), cert. denied, 429 U.S. 894 (1976); United States v. Von Moos, 660 F.2d 748, 749 (9th Cir. 1981).

Regardless of the fact that the panel is perfectly aware that no jurisdiction exists to inflict a second punishment on May, it has chosen to violate the Bill of Rights, specifically the right not to be punished twice for the same offense. In effect, the panel ruled that May voluntarily chose to be punished twice, because "May agreed to plead guilty to the tax charges, acknowledge his liability for the resulting criminal penalties, and further agreed to pay the previously-assessed tax penalties." The panel further held that May "failed to show cause and prejudice, or a fundamental miscarriage of justice, excusing his failure to raise the double jeopardy claim on direct appeal." These holdings when a double jeopardy claim has been advanced are contrary to United States Supreme Court precedents, contrary to every published decision on point with the facts of this case, and render the Double Jeopardy Clause a mere recommendation that can be ignored at the panel's

discretion.

May timely filed a Petition for Rehearing with a Suggestion for Rehearing En Banc. On October 3, 1996, May's Petition was denied.

REASONS FOR GRANTING THE WRIT

Statement of Facts and Conclusions of Law.

The Eighth Circuit, before Bowman, MaGill, and Loken, Circuit Judges, affirmed the District Court's Order denying Petitioner's 28 U.S.C. Section 2255 motion to vacate his sentence, making the following findings of fact and conclusions of law:

1. In his plea agreement, May agreed to plead guilty to the tax charges, acknowledged his liability for the resulting criminal penalties, and further agreed to pay the previously assessed tax penalties.

2. In any event, we agree with the government that May has failed to show cause and prejudice, or a fundamental miscarriage of justice, excusing his failure to raise the double jeopardy claim on direct appeal.

The Eighth Circuit's Opinion Conflicts with this Court's Decision in Menna v. New York, 423 U.S. 61 (1975).

The panel simply rubber stamped the Government's argument that since May failed to raise his double jeopardy claim at his guilty plea hearing and on direct appeal, he must show cause and prejudice. The panel's decision to affirm a second punishment against May when the District Court is without jurisdiction of the subject matter to impose same should not be condoned. It is simply beyond discussion that May did not voluntarily waive his double

jeopardy claim. May did not waive his double jeopardy claim through some affirmative act which indicated a waiver. There is no waiver of May's double jeopardy claim on this record, and there is no evidence of any affirmative act by May that could be construed as waiver of his double jeopardy rights. Brady v. United States, 397 U.S. 742, 748 (1970). There can be no reasonable finding that May knowingly and voluntarily waived his rights under the Double Jeopardy Clause. Although failure to specifically reserve a particular pretrial issue may preclude its consideration on appeal under Fed.R.Cr.Proc. 11(a)(2), this rule does not apply in the context of a motion for relief under 28 U.S.C. Section 2255. Section 2255 expressly provides that "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time." It is self-evident that the panel's decision renders this language a nullity as well.

Moreover, because a fundamental constitutional right is at issue, courts must subject the purported waiver to stringent scrutiny and "indulge every reasonable presumption against the loss of constitutional rights." Illinois v. Allen, 397 U.S. 337, 343.

Jurisdictional issues can always be considered, even *sua sponte* by the Court, whether or not raised with the trial court or on a direct appeal. See e.g., United States v. Storer Broadcasting Co., 351 U.S. 193, 197; Gutierrez v. Waterman S.S. Co., 373 U.S. 206, 209; Federal Communications Commission v. National Broadcasting Co., 319 U.S. 239, 246; Rochester Telephone Corp. v. United States, 307 U.S. 125, 128 n. 3; A.F.L. v. Labor Board, 308

U.S. 401, 403.

In United States v. Broce, 488 U.S. 563, 109 S.Ct. 757 (1989), the Supreme Court declared that a defendant may assert in a collateral attack that the face of the indictment or record against him establishes that his convictions violate the constitutional prohibitions against double jeopardy. 109 S.Ct. at 765. See also United States v. Pollen, 978 F.2d 78, 84 (3rd Cir. 1992) (collecting these collateral attack cases).

The issue on appeal was that the Double Jeopardy Clause prohibits the imposition of a second punishment against May, which goes to the jurisdiction of the trial court. This jurisdictional categorization is precisely what permits review of this Section 2255 petition. Jurisdictional defects are always, always, always subject to attack under Section 2255, as that statute expressly states. Thor v. United States, 554 F.2d 759, 762 (5th Cir. 1977). Although May did not raise this issue on direct appeal, collateral review is available under Section 2255 to correct jurisdictional errors. United States v. Gotches, 547 F.2d 80, 82 (8th Cir. 1977); U.S. v. Harper, 902 F.2d 471, 472-73 (5th Cir. 1990) (Failure to charge an offense may be raised for the first time in a Section 2255 petition because such error divests the sentencing court of jurisdiction); U.S. v. Osiemi, 980 F.2d 344, 345 (5th Cir. 1993) (such a challenge may be raised for the first time in a Section 2255 petition because such an error divests the sentencing court of jurisdiction); Kelly v. U.S., 29 F.3d 1107, 1114 (7th Cir. 1994) (Because jurisdictional defects are nonwaivable, Kelly need not provide us with an excuse —"cause and prejudice"— adequate to convince us to forgive his waiver); Knight v. U.S., 73 F.3d 117, 118 (7th Cir. 1995) (Knight did not file a direct appeal and concedes that he cannot show cause for and prejudice from this failure. Accordingly, we review only for jurisdiction); St. Cloud v. U.S., 702 F.Supp. 1456, 1458 (D.S.D. 1988) (St. Cloud's failure to present a jurisdictional argument at a prior stage of the proceedings does not prevent him from collaterally attacking the sentence under Section 2255. Similarly,

St. Cloud's plea of guilty to a federal offense does not waive a lack of subject matter jurisdiction).

Both conviction and sentence are vacated in cases where the second prosecution or punishment violates the Double Jeopardy Clause. Benton v. Maryland, 395 U.S. 784, 797-98 (1969). The jurisdictional exception to the general rule advanced by United States, and stamped with approval by the panel, exists in the instant matter. A constitutionally infirm proceeding where the government had no power to prosecute a second charge or impose a second punishment at all. Broce, 109 S.Ct. at 765-66. As noted in May's opening brief, and ignored by the panel, this Court held in Menna v. New York, 423 U.S. 61 (1975), the Fifth Amendment's Double Jeopardy Clause stands as an inhibition upon the government's right to institute charges. This inhibition applies to May. If the absence of constitutional authority prevents the government from instituting charges in the first instance or imposing a second punishment, a defendant can collaterally attack his conviction and sentence under Section 2255.

CONCLUSION

On November 3, 1992, an Indictment was filed with the United States District Court for the Western District of Missouri, Western Division, against May. On June 11, 1993, the Internal Revenue Service also issued a jeopardy assessment against Dr. May. On June 14, 1993, Internal Revenue Service agents appeared at the USMC and served the Notice of Jeopardy Assessment. The agents met with Dr. May and informed him for the first time that a jeopardy assessment had been made. The agents provided Dr. May with Notice Of Jeopardy Assessment And Right Of Appeal and a Notice of Tax Due on Federal Tax Return for the tax years 1985, 1986, 1987, 1988 and 1989. The agents also served on May Notice(s) of Tax Due on Federal Tax Return, which expressly included the fraud penalties. Pursuant to the demands, the IRS

seized funds from State Farm Insurance. On August 9, 1993, the Internal Revenue Service issued a statutory notice of deficiency.

The Government took the position that May was the sole owner of the forfeited property, and May forfeited all interest in the subject property by his plea agreement signed and entered on January 26, 1994. As argued in May's opening brief at pages 15-17, these identical facts are precisely why the Oakes Court found that Oakes civil penalty was the first punishment, because the plea agreement terminated jeopardy on the civil forfeiture when it was signed. Oakes, 872 F.Supp. at pp. 825-829. May appeared later that same date to plead guilty before the Court. The Court took the plea of guilty under advisement and accepted same a hour later. The Court subsequently orally sentenced May the same date. On February 1, 1994, the Court's judgment was entered finding May guilty on Counts One through Five of the Indictment.

Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanction are deemed punishment. In short, the criminal sentence was the second prohibited punishment.

May did not make a voluntary and knowing waiver of his double jeopardy claim, and a waiver of his right is not disclosed by the record in this case. The Double Jeopardy Clause prohibits a trial court from imposing a second punishment, and without a clear and unequivocal waiver on the record, May can collaterally attack his conviction and sentence under Section 2255.

WHEREFORE, Petitioner requests that this Court grant a writ of certiorari and accept jurisdiction to review the decision of the Eighth Circuit in order to insure conformity with this Court's Opinion in Menna v. New York, supra, and to settle the important federal question regarding the waiver of an individual's right not

to be punished twice for the same offense.

Respectfully submitted this 31st day of December, 1996.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JOSEPH A. MAY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 95-0606-CV-W-9
(No. 92-00193-01-CR-W-9)

ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT DEFENDANT'S CONVICTION AND SENTENCE UNDER 28 U.S.C. 2255

On June 23, 1995, defendant Joseph May filed a Motion to Vacate, Set Aside or Correct his Conviction and Sentence Under 28 U.S.C. 2255. The United States has filed opposition to defendant's motion.

I. Background

May was indicted by a federal grand jury on November 3, 1992, for five counts of failure to file a United States income tax return in violation of 26 U.S.C. 7203 and two counts of tax evasion in violation of 26 U.S.C. 7201. On June 11, 1993, the Internal Revenue Service (IRS) issued a jeopardy assessment against May for taxes, interest, and penalties owed to the United States for the years 1985 through 1989.

On January 26, 1994, May pled guilty to five counts of failure to file a federal tax return and the United States moved to dismiss the remaining tax evasion counts. May was sentenced on the same date to imprisonment of 191 days, one year supervised release, four months home detention, 150 hours of community service, and costs of prosecution.

May appealed his sentence to the Eighth Circuit Court of Appeals only as to the costs assessed relating to the charges for May's competency evaluation and the resulting hearings.

On June 22, 1995, May filed his motion seeking relief under 28 U.S.C. 2255. The United States responded to May's motion.

II. Discussion and Analysis

In May's Motion to Vacate, Set Aside or Correct his Conviction and Sentence Under 28 U.S.C. 2255, he claims that I violated his rights against double jeopardy by sentencing him. May argues that the United States already punished him for his tax crimes when the IRS issued a jeopardy assessment against him and seized his wife's insurance proceeds. May states the issue as follows:

> Whether the fraud penalties and other penalties provided by 26 U.S.C. Sections 6653(b)(1), (b)(2), (b)(1)(A), (b)(1)(B), 6651(f), 6654, and 6601 when applied to a defendant in an administrative proceeding after he has already been indicted for the same alleged conduct/offense, pursuant to 26 U.S.C. Sections 7201 and 7203, but before he was subjected to trial by jury, is partly punitive, which prohibits a defendant from being punished in the separate criminal proceeding a second time under the Double Jeopardy Clause.

May's Suggestions in Support of Motion to Vacate, Set Aside or Correct Defendant's Sentence Under 28 U.S.C. 2255 at 1.

A defendant may waive a constitutional right if the waiver is voluntary, knowing, and intelligent. Brady v. United States, 397 U.S. 742 (1970). "The protection of the Double Jeopardy Clause is a personal defense that may be waived or foreclosed by a defendant's voluntary actions or choices... ." United States v. DiPietro, 936 F.2d 6, 9 (1st Cir. 1991).

Here, May entered into a plea agreement with the United States. The Plea Agreement states in relevant part:

> **5. The United States and the defendant agree and stipulate that defendant should be ordered to pay his financial obligations on the criminal case as follows:**
>
> **a. on income tax due and owing for calendar years 1985 through 1989;**
>
> **b. for penalties for the same period;**
>
> **c. for interest for the same period;**
>
> **The parties further agree that these obligations should be ordered to be paid as follows: that these obligations be satisfied in the first instance from the money seized as a result of the IRS jeopardy assessment.**
>
> **9. The parties further understand that nothing in this agreement shall limit the Internal Revenue Service in its assessment and collection of any taxes, interest or penalties from the defendant.**

Please Agreement, [para.'s] 5 and 9 (emphasis added).

May pleaded guilty after the issuance of the IRS' jeopardy assessment. May agreed in the Plea Agreement to pay restitution (tax, penalty, and interest) for tax years 1985 through 1989, which could be satisfied from the proceeds seized as a result of the IRS jeopardy assessment. May also agreed that the criminal restitution did not reflect his civil tax liabilities, and that nothing in the plea agreement limited the IRS in the assessment and collection of such. Consequently, May waived any argument about double jeopardy sentencing from an assessment for unpaid taxes, penalties, and interest by entering into the plea agreement with the United States.

Accordingly, it is ORDERED that defendant's Motion to Vacate, Set Aside, or Correct his Conviction and Sentence Under 28 U.S.C. 2255 is denied.

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
December 27, 1995.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-1105

Joseph A. May,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the Western District of Missouri

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Submitted: July 23, 1996

Filed: August 1, 1996

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges.

PER CURIAM.

Joseph A. May appeal from the district court's order denying his 28 U.S.C. 2255 motion to vacate his sentence. We affirm.

Pursuant to a written plea agreement, May pleaded guilty to willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. On direct appeal, May challenged the district court's order assessing the costs of prosecution against him. We remanded

for further proceedings, because the costs included fees the government had paid to court-appointed mental health experts without first obtaining the district court's approval. See United States v. May, 67 F.2d 706, 707 *8th Cir. 1995).

In his section 2255 motion, May argued that the assessment of tax fraud penalties against him following his criminal indictment for the tax charges posed a double jeopardy bar to his punishment in the criminal proceeding. After de novo review, see United States v. Duke, 50 F.3d 571, 576 (8th Cir.), cert. denied, 116 S.Ct. 224 (1995), we conclude that the district court correctly denied relief. In his plea agreement, May agreed to plead guilty to the tax charges, acknowledged his liability for the resulting criminal penalties, and further agreed to pay the previously-assessed tax penalties. See United States v. Fritsch, 891 F.2d 667, 668 (8th Cir. 1989) (defendant who voluntarily and explicitly exposes himself to specific sentence may not challenge punishment on appeal). In any event, we agree with the government that May has failed to show cause and prejudice, or a fundamental miscarriage of justice, excusing his failure to raise the double jeopardy claim on direct appeal. See Ramey v. United States, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-1105WMKC

Joseph A. May,

Appellant,

v.

United States of America,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 3, 1996

Order Enter at the Direction of the Court:

Michael E. Gins

Clerk, U.S. Court of Appeals, Eighth Circuit